



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Logistical Support, Inc.

File: B-224592

Date: December 23, 1986

DIGEST

1. Minimum manning requirement in solicitation for fixed-price services contract does not create a personal services contract where the contractor is required to maintain control and supervision of its employees.
2. Requirement to maintain a daily work log showing employees on duty and hours worked, along with requirement that the log be available for agency review, used solely to ensure contract performance, is not objectionable, where agency is authorized to monitor and inspect contract performance.
3. Protest against deduction provisions in solicitation, filed after bid opening, is untimely.

DECISION

Logistical Support, Inc. (LSI), protests the terms of invitation for bids (IFB) No. DABT01-86-B-1024, issued by the Department of the Army, Fort Rucker, Alabama. The solicitation seeks bids to provide kitchen police services in three dining facilities at Fort Rucker for the period October 1, 1986, through September 30, 1987, with a 1-year renewal option. LSI objects specifically to the IFB manning requirements, and to the requirement that the contractor maintain a daily work log.

We deny the protest in part and dismiss it in part.

LSI's first basis for protest is that the solicitation essentially creates a personal services contract. Since the government is normally required to obtain its employees by direct hire under competitive appointment, agencies may not award personal services contracts unless specifically authorized by statute to do so. Federal Acquisition Regulation

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(FAR), 48 C.F.R. § 37.104 (1985). LSI refers to paragraph C.1.2.5. of the IFB which requires the successful bidder to expend a minimum number of man-hours in performing the required services. LSI maintains that this minimum manning requirement, in effect, converts the fixed-price contract into a personal services contract.

Our Office has previously considered minimum manning requirements in fixed-price service contracts. See J.E.D. Service Co., B-218228, May 30, 1985, 85-1 C.P.D. ¶ 615; Palmetto Enterprises, Inc., et al., B-193843 et al., Aug. 2, 1979, 79-2 C.P.D. ¶ 74. In J.E.D. Service Co. we expressly stated that the use of a minimum manning requirement in an advertised solicitation to procure mess attendant services was permissible.

Moreover, the FAR states that a personal services contract is characterized by the employer-employee relationship it creates between the government and the contractor's personnel, and that such a relationship occurs when contractor personnel are subject to the relatively continuous supervision and control of a government officer or employee. FAR, 48 C.F.R. § 37.104 (1986). We have held that an IFB specifying minimum manning requirements does not result in an improper personal services contract unless the nature of work to be performed and supervision and control by the government creates an employer-employee relationship between the government and the contractor's employees. See Industrial Maintenance Services, Inc., et al., B-189303 et al., Dec. 15, 1977, 77-2 C.P.D. ¶ 466.

In the present solicitation, paragraph C.1.3 of the IFB clearly indicates that the successful bidder will be responsible for providing the employees performing the required services and will also be responsible for providing the necessary supervision of those employees. Accordingly, we conclude that the minimum manning requirement does not create an employer-employee relationship between the government and the contractor's employees and we find no merit in LSI's contention that the terms of this solicitation create a personal services contract.

LSI next protests that the solicitation inappropriately calls for the disclosure of confidential information. LSI again refers to paragraph C.1.2.5. which, as amended, requires the contractor to maintain a daily work log disclosing which employees worked at the dining facilities and the hours they were on duty. LSI suggests that this information is similar to payroll information and asserts that the only authority requiring a contractor to provide payroll information is:

(1) the Changes clause; or (2) the Fair Labor Standards Act and Services Contract Act-Price Adjustment clause for multi-year and option contracts.

The record indicates that the log will not be used for payroll purposes. Rather, the log, a sign-in and sign-out sheet, is to be used to monitor contract performance, that is, as a means of inspection of services.

In this connection, the solicitation incorporates by reference the standard Inspection of Services clause contained in FAR, 48 C.F.R. § 52.246-4. This clause generally must be included in all fixed-price service contracts. FAR, 48 C.F.R. § 46.304. The Inspection of Services clause requires the contractor to provide and maintain an inspection system acceptable to the government covering the services under the contract, and maintain complete records of the inspection work performed by the contractor. 48 C.F.R. § 52.246.4(b). It also reserves to the government the right to inspect all services, to the extent practical, at all times during the term of the contract. 48 C.F.R. § 52.246-4(c).

Our Office has relied on the authority provided in the Inspection of Services clause in decisions upholding agencies' proposed methods of monitoring similar fixed-price service contracts. See Environmental Aseptic Services Administration, B-221316, Mar. 18, 1986, 86-1 C.P.D. ¶ 268; Sunrise Maintenance Systems, B-219763.2, Nov. 26, 1985, 85-2 C.P.D. ¶ 603. Specifically, in a bid protest challenging a solicitation for a fixed-price contract for custodial services, this Office considered whether the government could require the successful bidder to provide a detailed work schedule for the various tasks solicited which would be used by the government to evaluate performance. Ameriko Maintenance Co., B-221728, Apr. 1, 1986, 86-1 C.P.D. ¶ 309. There, we concluded that the government's interest in providing for an effective method of inspecting the contractor's performance adequately supported the requirement that task schedules be prepared and implemented.

In this situation, the only information the contractor must provide on the daily work log is the name and signature of the employees providing the required services at each dining facility and the hours they are on duty. We believe that the required maintenance of this log, along with its availability for review by the Army, is a reasonable requirement enabling the Army to monitor and evaluate the contractor's performance. We conclude this requirement is reasonably related to

the agency's general authority to inspect and monitor contract performance, and therefore, deny this aspect of the protest.

Finally, LSI complains, for the first time, in its comments to the agency report, that the contract provisions for deducting amounts for unsatisfactory performance are unfair. LSI alleges that a contractor faces "double jeopardy" under the IFB in that deductions may be taken both for failing to meet the minimum manning requirements and for unsatisfactory performance. This issue is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986), protests such as this one, based on alleged improprieties apparent in a solicitation, must be filed prior to bid opening. See White Office Systems, Inc., B-224252, Oct. 9, 1986, 86-2 C.P.D. ¶ 414. LSI's protest concerning the deduction provisions, filed after the bid opening, is therefore untimely and we dismiss this aspect of LSI's protest.

The protest is denied in part and dismissed in part.

for Seymour E. Fros
Harry R. Van Cleve
General Counsel